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COURT OF CRIMINAL APPEALS  
11/20/2017  
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IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF TEXAS

Ex parte Hector Macias

Supplement to Motion for Rehearing

Appeal from El Paso County

FOR HECTOR MACIAS:

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Submitted: November 20, 2017

PD-0480-17  
IN THE COURT OF CRIMINAL APPEALS  
OF THE STATE OF TEXAS

Ex parte Hector Macias

HECTOR MACIAS,

Appellant

THE STATE OF TEXAS,

Appellee

\* \* \* \* \*

APPELLANT'S SUPPLEMENT TO MOTION FOR REHEARING

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now Appellant (also Defendant at trial, and Respondent at the Court of Criminal Appeals), Hector Macias, by and through his attorneys of record, Maximino Daniel Munoz, and Mateo DeKoatz, and respectfully submits this Supplement to Motion for Rehearing in the above entitled and numbered cause.

## ARGUMENT AND AUTHORITIES

### I.

The United States Supreme Court recently decided the case of *Hamer v. Neighborhood Housing Servs. Of Chicago*, No. 16-658, November 8, 2017. A summary of this new case includes: An appeal filing deadline prescribed by statute is considered “jurisdictional,” meaning that late filing of the appeal notice necessitates dismissal of the appeal. See *Bowles v. Russell*, 551 U. S. 205–213. In contrast, a time limit prescribed only in a court-made rule is not jurisdictional. It is a mandatory claim-processing rule that may be waived or forfeited. *Ibid.* The Supreme Court and other courts have sometimes overlooked this critical distinction. See *Reed Elsevier, Inc. v. Muchnick*, 559 U. S. 154.

In *Hamer*, Petitioner Charmaine Hamer filed an employment discrimination suit against respondents. The District Court granted respondents’ motion for summary judgment, entering final judgment on September 14, 2015. Before October 14, the date Hamer’s notice of appeal was due, her attorneys filed a motion to withdraw as counsel and a motion for an extension of the appeal filing deadline to give Hamer

time to secure new counsel. The District Court granted both motions, extending the deadline to December 14, a two-month extension, even though the governing Federal Rule of Appellate Procedure, Rule 4(a)(5)(C), confines such extensions to 30 days. Concluding that Rule 4(a)(5)(C)'s time prescription is jurisdictional, the Court of Appeals dismissed Hamer's appeal.

The United States Supreme Court held that the Court of Appeals erred in treating as jurisdictional Rule 4(a)(5)(C)'s limitation on extensions of time to file a notice of appeal. Hamer, Pp. 5–10. The court held that the 1948 version of 28 U. S. C. §2107 allowed extensions of time to file a notice of appeal, not exceeding 30 days, “upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment,” but the statute said nothing about extensions when the judgment loser did receive notice of the entry of judgment. In 1991, the statute was amended, broadening the class of prospective appellants who could gain extensions to include all who showed “excusable neglect or good cause” and reducing the time prescription for appellants who lacked notice of the entry of judgment from 30 to 14 days. §2107(c). For other cases, the statute does not say how long an extension may run. Rule 4(a)(5)(C), however, does prescribe a limit: “No extension [of time for filing a notice of appeal] may exceed 30 days after the prescribed time [for filing a

notice of appeal] or 14 days after the date [of] the order granting the [extension] motion . . . , whichever is later.” Pp. 5–6.

Hamer’s new precedent shapes a rule of decision that is both clear and easy to apply. If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional; otherwise, the time specification fits within the claim-processing category. In concluding otherwise, the Court of Appeals relied on Bowles. There, Bowles filed a notice of appeal outside a limitation set by Congress in §2107(c). The Supreme Court held that, as a result, the Court of Appeals lacked jurisdiction over his tardy appeal. 551 U. S., at 213. *In conflating Rule 4(a)(5)(C) with §2107(c) here, the Seventh Circuit failed to grasp the distinction between jurisdictional appeal filing deadlines and deadlines stated only in mandatory claim-processing rules.*[Emphasis added.] It therefore misapplied Bowles. Bowles’s statement that “the taking of an appeal within the prescribed time is ‘mandatory and jurisdictional,’ ” *id.*, at 209, is a characterization left over from days when the Court was “less than meticulous” in using the term “jurisdictional,” *Kontrick v. Ryan*, 540 U. S. 443. The statement was correct in Bowles, where the time prescription was imposed by Congress, but it would be incorrect here, where only Rule 4(a)(5)(C) limits the length of the

extension. Pp. 7–10. The Seventh Circuit’s decision, denying jurisdiction, was reversed, and the case was vacated and remanded.

## II.

Defendant-Respondent Hector Macias urges the Court of Criminal Appeals to apply *Hamer* to the case at bar. In the Macias decision, the Court of Criminal Appeals states:

The trial court called the case for trial on January 16, 2014.<sup>3</sup> The jury was chosen and sworn, the parties presented their evidence, and the guilt-phase jury charge was read to the jury. At that point, a prosecutor in the appellate section of the district attorney’s office approached the trial court with the information that the appellate mandate had not yet issued. Concluding that trial proceedings were a nullity and that it could not even declare a mistrial, the trial court dismissed the jury. The appellate mandate issued on January 30, 2014.

Opinion, p. 2.

When the State appeals under Article 44.01(a) or (b)—which includes an appeal of the granting of a motion to suppress—the State “is entitled to a stay in the proceedings pending the disposition” of the appeal. And, under Rule of Appellate Procedure 25.2(g), once the appellate record is filed in the appellate court, “all further proceedings in the trial court—except as provided otherwise by law or by these rules—will be suspended until the trial court receives the appellate court mandate.” In *State v. Robinson*, we considered the interplay between these provisions and held that “the trial court is deprived of jurisdiction over the case during the pendency of” a State’s appeal and that jurisdiction resumes in the trial court only after “the appellate court’s . . . mandate issue[s].” Consequently, we hold that the trial court was correct in concluding that it lacked jurisdiction over the case because the appellate mandate had not yet issued.

In the case at bar, Macias contends that the Texas Rules of Appellate Procedure cited by the Court are not *statutory* [emphasis added] bars to the jurisdiction of the trial court; and that the State and trial court accepted jurisdiction, without objection, and placed Macias in jeopardy.

See *How Texas Court Rules Are Made*, p. 5-6, by Nathan Hecht, Martha Newton, and Kennon Wooten:

III. Comparison: Court of Criminal Appeals' Rulemaking Authority In contrast to the broad authority expressly granted to the Supreme Court, the Court of Criminal Appeals' constitutional and statutory rulemaking authority is limited. The only constitutional reference to the Court of Criminal Appeals' rulemaking authority is Article V, Section 31's statement that the "legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law." The legislature has only delegated to the Court of Criminal Appeals the power to promulgate three specific categories of litigation rules: (1) "rules of posttrial, appellate, and review procedure in criminal cases"; (2) "rules of evidence in the trials of criminal cases"; and (3) "rules and procedures providing for and governing the electronic filing of briefs, pleadings, and other documents for capital cases in that court." It is unclear whether the Court of Criminal Appeals has the inherent authority to independently make other types of rules governing criminal cases—such as rules of criminal procedure in the trial courts—or whether that authority has been delegated to the Supreme Court through the provisions in the constitution and the Government Code granting the Supreme Court the authority to make rules for the administration of justice in criminal cases. As a practical matter, the issue would only be raised if the Court of Criminal Appeals promulgated rules for criminal cases that were not jointly approved by the Supreme Court. But the two high courts strive to reach an agreement on criminal rules in order to avoid that scenario. For example, in 2015, the Supreme Court and the Court of

Criminal Appeals jointly approved rules governing electronic filing in criminal trial court cases.

<http://www.txcourts.gov/media/1374851/How-Court-Rules-Are-Made.pdf>

### III.

Because the trial court and State were not deprived jurisdiction by the failure of the mandate to issue, under a non-statutory rule of procedure, Defendant-Respondent Macias was placed in jeopardy, and the State should be prohibited from re-prosecuting Francisco Macias.

### CONCLUSION

#### PRAYER FOR RELIEF

Wherefore, Appellant prays that the Court consider his Supplement to Motion for Rehearing, and that the El Paso Court of Appeal's judgment be affirmed in all things, and that the prosecution against Hector Macias be dismissed with prejudice based upon the trial court's and State's violation of the Double Jeopardy Clause, 5<sup>th</sup> Amendment, to the United States Constitution.



Respectfully submitted,

*/s/ Max Munoz*

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## CERTIFICATE OF SERVICE

The undersigned certifies that on this 20th day of November, 2017, the Appellant's Motion for Rehearing was served via electronic service provider to:

Mr. Jaime Esparza,  
District Attorney  
El Paso County, Texas  
500 East San Antonio  
El Paso, Texas 79901

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*/s/ Max Munoz*  
Maximino Daniel Munoz